

The Appeals Board finds the issues above enumerated are listed in K.S.A. 44-534a as jurisdictional and appeal from this preliminary hearing is appropriately before the Appeals Board.

Claimant worked for respondent for slightly less than three (3) days in December, 1994. While so employed he alleged injury to his left shoulder, left arm and the center of his back and chest.

Claimant stated, while working on December 14, 1994, he felt muscle movement in his back which felt slushy, and his back popped. After completing several more jobs, claimant returned to his employer's location and allegedly advised the respondent-owner, Mr. David Spaulding, of the injury. Claimant was advised on December 14 that his employment with respondent was not working out and further employment would not be possible. Claimant immediately obtained additional employment as an independent contractor with Sears installing ice machines.

On December 15, 1994, claimant appeared at the respondent's location and obtained his first and last employment check. He alleged at that time that he told respondent's wife Jackie Spaulding, the office manager, of the injury. Both David Spaulding, the owner of United Plumbers, Inc., and his wife Jackie Spaulding, the office manager, deny being told by claimant of any work-related injury suffered on the job.

Claimant contacted Dr. Paul Lesko regarding his ongoing back problems. Dr. Lesko had treated claimant in the past for pre-existing back problems and, as of September 9, 1994, claimant was under a twenty-five to thirty (25-30) pound overhead lifting limitation with limited pushing and pulling. Dr. Lesko's office advised claimant to use muscle exercises for thirty (30) days in order to correct these physical problems.

Respondent was contacted by telephone on February 21, 1995, regarding authorization for ongoing medical care for claimant's work-related injury. David Spaulding advised this was the first notice he had received of claimant's alleged injury in December, 1994 and denied authorization for the treatment.

Claimant further alleged that at the time he suffered the injury, the homeowner at the location where he was working was attempting to assist him in moving the sewer machine in and out of the basement. He contended the homeowner was aware of the injury, but when the homeowner was contacted by Jackie Spaulding, the homeowner was unaware claimant had suffered any type of injury while working at that location. The medical records placed into evidence show claimant received medical treatment by Dr. Paul Lesko on September 9, 1994 for his pre-existing rotator cuff problem. The next medical records in evidence are dated April 10, 1995.

Claimant represented himself initially in this matter attending a benefit review conference on March 30, 1995. At that time, claimant advised the benefit review officer that he injured his left shoulder and chest muscle on December 13, 1994. He further advised that he had informed the wife of the owner on the date of injury of the alleged problem.

K.S.A. 44-501 and K.S.A. 44-508(g) require that claimant shall have the burden of proof in workers compensation matters to establish claimant's right to an order of compensation and to prove the various conditions on which claimant's right depends by

a preponderance of the credible evidence. See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-520 states:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within ten 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section is due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant first contends that he advised David Spaulding of his injury on the alleged injury date and that he advised David Spaulding's wife of the injury the next day. This is contradicted by his statements at the benefit review conference. Claimant goes on to testify his failure to advise respondent of his injury was due to his inability to readily ascertain that he was injured or to appreciate the gravity of the injury, thus justifying his failure to notify the respondent within ten (10) days of the accident.

Claimant's argument appears to contradict itself. Either he notified respondent within ten (10) days or he did not. Claimant, when filing his E-1 in this matter, alleged injury to his left shoulder, arm, and left center chest. At the benefit review conference he informed the benefit review office that he had hurt his left shoulder and chest, while testifying at the preliminary hearing that he had hurt his back.

The Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent on the date alleged. The contradictory evidence contained in the record defeats the claimant's obligation to satisfy the burden of proof, under K.S.A 44-501 and 44-508(g).

The Appeals Board further finds claimant failed to prove that he notified respondent within ten (10) days of the alleged injury. The testimony of David Spaulding and Nancy Spaulding appear more credible and convince the Appeals Board that notice was not properly given as required by K.S.A. 44-520.

The Administrative Law Judge, in granting claimant benefits, found claimant had failed to advise respondent of the accident within ten (10) days but felt just cause existed for this lack of notice, due to the claimant's lack of knowledge of the accident and the gravity of the injury. Claimant testified to a sudden onset of symptoms on the date of injury. Claimant's argument that claimant could not reasonably ascertain that he was

injured or be able to appreciate the gravity of the injury after describing the sudden injury is not accepted by the Appeals Board. It is significant also that claimant described a sudden onset of symptoms followed by almost immediate contact with Dr. Lesko's office regarding an appropriate exercise program.

Claimant's attorney argues that to hold claimant to the "harsh" 10-day rule in this case would require him to have more knowledge than can be reasonably expected. A review of the file indicates claimant had filed, litigated and settled workers compensation claims in the past on more than one occasion without being represented by an attorney. The written claim in this case submitted by claimant while unrepresented, shows some knowledge of the workers compensation laws of this state. Therefore, the argument that claimant was being required to have more knowledge than can reasonably be expected is not accepted under the circumstances of this case, even absent a showing that claimant was advised he must report all accidents within ten (10) days.

K.S.A. 44-520 requires notice of the accident within ten (10) days or, if just cause exists, within seventy-five (75) days. Lack of knowledge of an accident, while possibly constituting just cause under certain circumstances, does not exist in this case and the failure to comprehend the gravity of the injury as argued by claimant appears to be contradicted by the greater weight of the credible evidence. The Appeals Board finds claimant has failed to provide notice within ten (10) days as required by K.S.A. 44-520 and further finds just cause did not exist for this failure on claimant's part.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 4, 1995, shall be and is reversed and claimant is denied benefits from respondent as a result of injuries alleged on or about December 14, 1994.

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Peter John Orsi, Wichita, KS
Ronald J. Laskowski, Topeka, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director